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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 9

HUGH W. GRANT, Receiver of the Struthers Furnace Company,
Petitioner,

vs.

A. B. LEACH & CO., INC.,
Respondent.

RESPONDENT'S PETITION FOR REHEARING.

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A. B. LEACH & CO., INC.,
Respondent.

RESPONDENT'S PETITION FOR REHEARING.

MAY IT PLEASE THE COURT:

The respondent respectfully asks that a rehearing be granted in this cause for the following reasons:

1. The Court inadvertently construed against the respondent its contract with The Struthers Furnace Company for the purchase of the bond issue. The construction of this contract obviously concerns the *merits,* which were not properly before this Court. The Court's construction is, we believe, erroneous. Whether it is or not, this Court should not, in passing upon purely *jurisdictional* questions, express its views on the merits.

2. The Court's holding that the Common Pleas Court had jurisdiction of the petitions for the appointment of a receiver in the suits of the mortgage trustee and preferred stockholder, and that, therefore, the orders subsequently made by it could

not be collaterally attacked, is, we respectfully submit, contrary to settled law.

3. The Court departed from the issues joined in the Circuit Court of Appeals, and failed to give effect to the stipulation of the parties in that court.

4. The Court (in one instance) inadvertently misstated the contentions of respondent.

5. A re-examination of the record will, it is believed, show that the Court has inadvertently failed to pass upon the respondent's contentions, and that the decision rendered is unsound.

6. The Court's decision that Grant, as receiver, could sue in the District Court is based upon a misapprehension of the facts, and, we respectfully submit, is erroneous.

I.

This honorable court inadvertently construed against the respondent its contract with the Struthers Furnace Company for the purchase of the bond issue.

On page 2 of the Court's opinion it is said:

> "1. The bonds in question were part of an issue of eight per cent bonds of the Furnace Company, secured by a mortgage upon certain real and personal property. In 1922 Leach & Co. purchased from the Furnace Company a large number of these bonds, at 90½ and accrued interest, *in exchange for 3,000 shares of the seven per cent preferred stock of the Furnace Company, at 85 and accrued dividends.*" (Italics ours.)

The contract for the purchase of the bonds gave Leach & Co. the option to purchase at 90½ *the whole or any part* of an issue of $1,500,000. par value. (R. 22.) It also provided that in the event the option was exercised, Leach & Co. should pay cash for all bonds purchased up to $800,000. par value. If bonds in excess of $800,000.

par value were purchased, then Leach & Co. were to pay for bonds of the par value of $450,000. *partly in cash and partly in preferred stock.* The remaining bonds, of the par value of $250,000., if taken, were to be paid for in cash. (R. 23.)

Leach & Co. made *one* election to take the *entire* issue of bonds, (R. 135), and thereafter did so. When Grant, as receiver, sought to rescind this executed contract, he did not tender the preferred stock *and* the more than $1,000,000. in cash that had been paid thereunder, but only the preferred stock. The respondent contended that *partial* rescission of an executed contract was unknown to the law; that it had never agreed to pay *all* cash for *all* the bonds, and that the court could not make a new or better contract for the company, especially some three years afterwards when conditions had changed. The respondent also contended that Grant, as receiver, could not separate that part of the contract that permitted respondent to pay partly in cash and partly in preferred stock from the other parts of the contract, in view of the *single* election made by respondent, and that in any event *no* bonds had been paid for *wholly* in preferred stock.

The District Court held that Grant could at the same time "both approbate and reprobate," and that there was no other consideration for part of the bonds than 3,000 shares of preferred stock. (R. 205, 213.) According to the authorities the learned court was wholly wrong.[1] However, that question is not now

1. **Stewart v. Stewart Hotel Co., (Cal.) 164 Pac. 620.**
Memphis & Little Rock R. R. Co. v. Dow, 120 U. S. 287.
McKee v. Title Ins. & Trust Co., (Cal.) 113 Pac. 140.
Missouri River, Ft. Scott & Gulf R. R. Co. v. Commissioners, 12 Kans. 482—Brewer, J.
Dickerman v. Northern Trust Co., 176 U. S. 181, 202.

before this Court, nor was it argued on the hearing. What this Court does by means of the excerpt above quoted is not to state the *facts*, but to *construe* the contract, *apply the law*, and announce *legal conclusions*. This cannot fail to prejudice the respondent in any future hearing on the merits. Since the Court merely undertook to determine jurisdictional questions, we respectfully submit that any intimation of its views on the merits is improper.

Jones v. *Randolph*, 104 U. S. 108, 110.
Meccano, Ltd. v. *Wanamaker*, 253 U. S. 136.
Glasgow v. *Baker*, 128 U. S. 560, 577-8.
2 Austin's Jurisprudence, p. 658 (Lecture 39.)
Hoe v. *Wilson*, 9 Wall. 501, 503.

We respectfully ask that the foregoing excerpt from the opinion herein be changed to state the *facts*, rather than legal conclusions.

II.

The court's holding that the common pleas court had jurisdiction of the petitions for the appointment of a receiver in the suits of the mortgage trustee and preferred stockholders, and that, therefore, the orders subsequently made by it could not be collaterally attacked is, we submit, demonstrably erroneous.

On page 5 of the opinion it is said:

"The Common Pleas Court had jurisdiction of

Burnes v. Burnes, (C. C. A. 8th Cir.) 137 Fed. 781, 800.

St. Louis, Vandalia and T. H. R. R. Co. v. Terre Haute and Indianapolis R. R. Co., 145 U. S. 393.

Bullard v. Eames, (Mass.) 106 N. E. 584, 586.

Pittsburgh F. B. & T. v. American Clay Machy. Co., (Ohio) 106 N. E. 33.

Central Ohio Natural Gas & F. Co. v. Capital City Dairy Co., (Ohio) 53 N. E. 711.

> the petitions for the appointment of a receiver in the suits of the mortgage trustee and preferred stockholder; and the power to determine whether, under the allegations of the petitions, it was authorized to appoint a receiver of the Company's property; to what extent and for what purposes; and what authority should be vested in him as such receiver."

This is the first ground upon which the Court rested its decision, and the principle above stated is applied on pages 5 and 6 of the opinion. It is there held that neither the orders appointing the receiver, nor the order directing him to sue, even if they were so erroneous that they would have been set aside on appeal, can be collaterally attacked, because the court had jurisdiction of the petitions and was authorized to determine what action it should take.

We respectfully submit that the vice of this Court's decision lies in—

> (a) the erroneous assumption that the power of a court to determine whether or not it is authorized to act renders any action taken by it invulnerable to collateral attack;
>
> (b) the equally erroneous assumption that where jurisdiction of a cause is once obtained no order thereafter made therein can be collaterally attacked;
>
> (c) a misapprehension of what constitutes jurisdiction, and
>
> (d) the erroneous conclusion that the Common Pleas Court had jurisdiction to make the orders in question.

In every case that is, or can be, brought before it a court has the power to determine whether or not it is authorized to grant the relief prayed for, and whether or not it should do so. But that is far from determining *jurisdiction.*

Take, for example, the case where an application for letters testamentary or of administration is made to a probate court. The court has power to grant these letters in a proper case. Certainly it has power to determine whether or not it is authorized to grant the letters. But even if the proceedings are in all respects regular, if it should appear after the estate has been closed that the supposed decedent was in fact still alive, the entire proceedings would be *void,* and any sale of real estate or other property would be subject to *collateral attack.*[2] Or take the case where a person has been convicted of an offense under an unconstitutional act, or where a single offense has been split up into several causes and the offender pursued twice or more. In each of these cases the court would have the power to determine the questions presented to it for decision. And yet, in case of conviction the judgment would be void.

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2. **Griffith v. Frazier, 8 Cranch 9, 3 L. ed. 471.**
Duncan v. Stewart, 25 Ala. 408.
Beckett v. Selaver, 7 Cal. 215, 242.
Jochumsen v. Suffolk Savings Bank, 3 Allen (Mass.) 87.
Withers v. Patterson, 27 Tex. 491.

According to the Court's opinion herein, even if it appeared on the face of an application for letters testamentary upon the estate of a person that the person in question was alive and compos mentis, no order granting the application or ordering the sale of real estate would be subject to collateral attack. We say this for the reason that an action solely for the appointment of a receiver, at the instance of a stockholder, who charges no breach of duty or other wrongful act, is as unknown to the law as an application for letters of administration or testamentary upon the estate of a living person. And yet this Court held that because the Court of Common Pleas had "jurisdiction" of the petition and power to determine whether it was authorized to appoint a receiver, the orders entered by it could not be collaterally attacked even by one not a party to the proceeding when some one else claimed the benefit of them.

No appeal would be necessary. The defendant would be released on *habeas corpus.*[3]

It follows, therefore, that the criterion adopted and applied by the Court in the case at bar would seem to have no foundation in either logic or law.

The reasons given in the cases cited are conclusive of the proposition that a court may obtain jurisdiction of a cause and yet make an order therein that is *void,* and, therefore, subject to collateral attack. As above pointed out (b) the Court's opinion herein rests upon the contrary assumption.

Take, for example, the case where an offense is duly and regularly charged, and the defendant has been duly and regularly tried and found guilty in a court having jurisdiction of the cause. There can be no doubt of the authority of the court to hear the cause. And yet, if the offense is punishable only by fine and not by imprisonment, and the latter penalty is imposed, the judgment would be *void* just as if jurisdiction of the cause had never existed.[4]

Another example: Take the case of *Sterrett* v. *Second National Bank,* 248 U. S. 73, 76, as well as the other cases cited on p. 37 of our original brief in opposition to the petition for certiorari herein, where a local court with undoubted jurisdiction of the cause entered an order directing its receiver to bring suit in a foreign juris-

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3. **Hans Nielsen, 131 U. S. 176, 182.**
Ex parte Siebold, 100 U. S. 371.
Ex parte Lange, 18 Wall. 163.
In re Snow, 120 U. S. 274.
In re Coy, 127 U. S. 731, 758.
Sennott's Case, 146 Mass. 489.

4. **Ex Parte Reed, 100 U. S. 13, 23, and cases cited.**

diction. Unquestionably it had the power to determine whether it was authorized to grant the application for leave to sue. Yet the order was a nullity.

Or take the case of proceedings to foreclose a mortgage where service is obtained by publication of summons and a personal judgment is rendered against the defendant;[5] *or the case of an assignment of dower where it includes lands not embraced in the petition for assignment*[6]*; or orders authorizing or confirming the sale of lands by administrators or trustees where the land in controversy was not included in the petition to sell*[7]; or the case where land is ordered sold by an administrator but without any showing that a sale is necessary to pay debts[8]; or the case where in an action on a (mortgage) note for a money judgment only, a judgment of foreclosure is entered.[9] In each of these cases the judgment would be wholly void, and consequently subject to collateral attack, despite the fact that it was made in a cause whereof the court had (general) jurisdiction.

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5. Wood v. Stanberry, 21 Ohio State 142.

6. Falls v. Wright, 55 Ark. 562, 29 Am. St. Rep. 74, 18 S. W. 1044.
   Corwithe v. Griffing, 21 Bart. (N. Y.) 9.
   Seamster v. Blackstock, 83 Va. 232, 5 Am. St. Rep., 2 S. E. 36.

7. Shriver's Lessee v. Lynn, 2 How. 43, 11 L. ed. 172.
   Verry v. McClellan, 6 Gray (Mass.) 535, 66 Am. Dec. 423.
   Townsend v. Gordon, 19 Cal. 188.

8. Heirs of Bishop v. Hampton, 15 Ala. 761, 766.
   Wright v. Edwards, 10 Ore. 298.
   Hays v. McNealy, 16 Fla. 409.
   Kindell v. Titus, 56 Tenn. (9 Baxter) 727, 739.

9. Spoors v. Cowen, 44 Ohio State 497, 9 N. E. 132, 135.

This is true for several reasons. One of these is that courts cannot *ex mero motu* set themselves in motion, nor have they power to decide any questions except those presented by the parties in their pleadings. What is decided within the issues is *coram judice;* anything beyond them is *void.* In other words, general jurisdiction of a controversy is not alone sufficient. It does not give the court a universal license to enter such orders as it pleases. And particular matters that may be determined by a court in a cause whereof it has general jurisdiction are doubly limited. Firstly, *by the general nature of the controversy*[10], and, secondly, *by the issues presented by the pleadings.*

Now let us apply the foregoing principles to the case at bar.[11]

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10. As pointed out by Mr. Justice Field in Windsor v. McVeigh, 93 U. S. 274, 282:

> "If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. Instances of this kind show that the general doctrine stated by counsel is subject to many qualifications. The judgments mentioned, given in the cases supposed, would not be merely erroneous; they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases."

11. The two petitions filed in the Court of Common Pleas are so essentially different that lumping them together, as this Court did in its opinion herein, cannot fail to result in confusion. We shall take up each petition separately.

Of course, the Court of Common Pleas had general jurisdiction of the controversy presented by the petition of the trustee to foreclose the mortgage. This fact is important, but by no means conclusive. The question is, *what controversy was presented to the court for decision?* As demonstrated in our former briefs herein, the petition showed on its face that the mortgage did not cover all the property of The Struthers Furnace Company, and whether a receiver should be appointed for property not so covered was not presented to the court for decision. It was not an issue that could be determined by the court. And its order appointing a receiver for property not covered by the mortgage was, *pro tanto,* not responsive to the pleadings, but *coram non judice* and void.[12]

The court has failed to pass upon this point directly, or to state all the facts. In its statement the Court says

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12. **Reynolds v. Stockton, 140 U. S. 254, 35 L. ed. 464, 11 Sup. Ct. Rep. 773.**
Hurr v. Davis, 155 Minn. 456, 193 N. W. 943, 194 N. W. 379, petition for certiorari denied, 263 U. S. 709, writ of error dismissed, 267 U. S. 572.
Spoors v. Cowen, 44 Ohio State 497, 9 N. E. 132.
Remington v. Superior Court, 69 Cal. 633, 11 Pac. 252.
Waterman v. Lawrence, 19 Cal. App. 753, 218 Pac. 61.
Knopf v. Morel, 111 Ind. 570, 13 N. E. 51.
Williams v. Childress, 25 Miss. 78.
State ex rel. McManus, 217 Mo. 124, 117 S. W. 25.
Banking House, etc. v. Dukes, 70 Neb. 648, 97 N. W. 805.
Edinburg Irr. Co. v. Ledbetter, (Tex.) 247 S. W. 335.
Strobe v. Downer, 13 Wis. 10.
State v. Molly, 18 Iowa, 525.
Eames v. Northumberland, 44 N. H. 67.

that the trustee prayed that a receiver be appointed to take charge of the "property of the defendant," (p. 2), and apparently some reliance is placed upon the prayer of the trustee. However, in our supplemental brief (p. 16) we cited decisions by the Supreme Court of Ohio in support of the universal rule that a prayer is no part of the issues to be tried, and cannot authorize relief not warranted by the facts pleaded.[13] Manifestly, this point should not be ignored by the Court, and, clearly, to say that the Common Pleas Court has jurisdiction of the petition is to stop short of the *crucial* point in the case. It had (general) jurisdiction, yes, but *not* jurisdiction to appoint a receiver for property not covered by the mortgage. That question was not presented by the pleadings.

Since the order appointing Grant receiver for property not covered by the mortgage was, *pro tanto,* void, it necessarily follows that Grant cannot sue Leach & Co. even though he was ordered to do so by the Court of Common Pleas. The claim asserted by the receiver against Leach & Co. "was a chose in action of the Furnace Company," (Opinion, p. 5), which was not, of course, covered by the mortgage, neither was it ever assigned by the Struthers Company to the receiver, who does not take title even to property of which he is lawfully appointed receiver.[14] If the order appointing him

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13. **To which may be added:**
Petition of Furness, 62 Cal. App. 753, 218 Pac. 61.

14. **Lafayette Bank v. Buckingham, 12 Ohio St. 419.**
Morley v. Cleveland Hippodrome Co., 23 Ohio C. C. (N. S.) 295, 297.
1 Tardy's Smith on Receivers (2nd ed.) § 338, p. 845.

receiver of this chose in action was void, then, of course, neither the Court nor the receiver could thereafter take any lawful action concerning it, particularly so far as its enforcement is concerned.

This Court says that section 11897 of the General Code of Ohio provides that the court may authorize a receiver to sue, etc., and that

> "under this provision the Common Pleas Court had jurisdiction to determine what actions the receiver might bring." (P. 6.)

Manifestly, the authority granted by section 11897 is limited, not only by the general nature of the proceedings in which the receiver is appointed, but to cases concerning property of which he had lawfully been appointed receiver. It certainly would not include power to authorize the enforcement of a chose in action in a case where the pleadings did not authorize the court to appoint a receiver of it.[15] A court always has jurisdiction for cer-

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15. In simple foreclosure proceedings against a corporation, § 11897 would hardly justify an order directing the receiver to sue the corporation defendant on a claim held against it by a simple-contract creditor. An order directing the receiver to bring suit to enforce a purely personal claim of a bondholder against Leach & Co. would likewise be void. Also in foreclosure proceedings against a person, an order directing the receiver to institute proceedings for separate maintenance in behalf of the defendant's wife, would be a nullity. The order directing the receiver to sue Leach & Co. on a chose in action not covered by the mortgage, and of which Grant was never lawfully appointed receiver, is equally void.

tain purposes only.[16] And this is particularly true of simple foreclosure proceedings.

And here it should be pointed out that Section 11894 of the Ohio Code (Appendix, p. 34, *infra*) provides for the appointment of receivers in a great many other cases than mortgage foreclosure proceedings. Consequently the power granted the court (by Cection 11897, p. 35, *infra*) to authorize the institution of suits by receivers is *necessarily* limited by the *nature of the proceedings* in which the receiver was appointed, no less than by the issues presented for decision.

The power of the Common Pleas Court was limited, then, by the general nature of the proceedings, which were instituted solely for the purpose of foreclosing a mortgage. Insolvency was not alleged; a winding up of The Struthers Furnace Company was not sought. Indeed,—and this important fact was not stated by this court,—the petition expressly alleged that *all the bonds were duly issued for a valuable consideration in accordance with the terms of the mortgage; that all bonds were then outstanding in the hands of various persons and corporations, who were the owners and holders thereof for value, and that all the bonds were in all respects valid and outstanding obligations of the defendant.* (R. 238.)

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16. **Wood v. Stanberry, 21 Ohio State 142.**

Boswell v. Dickerson, 4 McLean 262.

Fithian v. Monks, 43 Mo. 502.

As said in Williamson v. Berry, 8 How. 495, 543:

"Though there may be jurisdiction for certain purposes in a cause, that jurisdiction may be exceeded in the judgment."

The very action in which an erring court appointed this knight-errant receiver was predicated upon the valid issuance of *all* the bonds. The very purpose of the suit was to procure the payment of all the bonds. Unlike a receiver appointed in many other cases, a receiver appointed in simple foreclosure proceedings is an indifferent stakeholder, who merely conserves and manages the mortgaged property and the fruits thereof. Neither he nor the court is concerned with anything else. The court's power is limited to ascertaining the amount due under the mortgage, preserving the mortgaged assets, selling them if necessary, and applying the proceeds. That is all that it has the power to do. Its power to enter orders in the case is necessarily limited not only to the issues presented by the pleadings, but by the nature and purpose of the proceedings. In a winding-up proceeding, where insolvency, fraud, etc., were alleged, of course, the court could order its receiver to institute suits where the rights of creditors or others had been infringed.

But here, the petition does not show that there were any creditors other than bondholders. Insolvency was not alleged. The valid issuance of all bonds was the bedrock upon which the court's jurisdiction was predicated. The invalidity of not one bond was an issue in the case. And how could the court have jurisdiction to order this mere stakeholder to attack the contract pursuant to which all the bonds had been issued? The order entered by the court was entirely beyond the scope and purpose of the proceeding and wholly void. It was contrary to the jurisdiction conferred upon the court by the allegations of the petition, by which all subsequent action was limited, as is shown by the cases cited on pages 9-12, *supra*.

On page 6 of the opinion herein it is said:

> "This action against Leach & Co.,—involving in effect the claim of an illegal taking of a large amount of the Company's bonds, which if recovered would reduce the amount of the mortgage lien—came, we think, fairly within the terms of the statute as an act respecting property in the custody of the court in the trustee's suit."

We respectfully submit that whether or not the action, if successful, would reduce the amount of the mortgage lien, is irrelevant. Speculation in the stock market with the proceeds of mortgaged assets would also, if successful, reduce the amount of the mortgage lien. Obviously, the test suggested by the court is a fallacious one. It is a question of *lawful authority,* not of *results.* And the order entered by the Court of Common Pleas is condemned by the law, just as conversion of trust funds is condemned by ethics regardless of its enrichment of the wrongdoer.

Moreover, this Court's very statement of the test above quoted conclusively shows that the action is *hors* the scope of the petition to foreclose. Indeed, the former is squarely opposed to the latter, since the petition expressly alleged that *all* the bonds had been lawfully issued and were valid claims against the corporate defendant. The petition was never amended, and, so far as the record shows, the corporate defendant never, either by answer or by proof, disputed or attempted to controvert the allegations of the petition.

Furthermore, we submit with great respect, this Court's statement of the test will not bear analysis. The only *property in custody* of the Court of Common Pleas was the *property covered by the mortgage.* The action against Leach & Co. was on a chose in action that was

not covered by the mortgage. Consequently the action could not be "an act respecting property in the custody of the court." Surely, this Court does not mean to imply that the *bonds* were in the custody of the Court of Common Pleas. And certainly not the *mortgage lien.*

In support of its conclusion that the order directing the receiver to sue is not subject to collateral attack the Court cites

Sanger v. *Upton, Assignee,* 91 U. S. 56, 58.

We respectfully submit that the case is readily distinguishable. That case concerned the power of an assignee in bankruptcy to collect the balance due on a subscription to the capital stock of the corporate bankrupt. The bankruptcy court had entered an order directing the assignee to sue all stockholders who refused to pay. Plaintiff in error contended that she was not bound by the order since at the time it was entered "she was not before the court." (P. 57.) This Court pointed out that

> "in view of the law she was before the court in all the proceedings touching the body of which she was a member." (P. 59.)

This Court also pointed out that

> "by the deed of assignment, all the property and effects of every kind, which belonged to the company when the petition to have it declared bankrupt was filed, passed to the assignee. Bump on Bankruptcy, 473, 478; Rev. Stat. sect. 5044. * * The statute in terms gave him the same right in any litigation he might institute which the bankrupt would have had 'if the decree in bankruptcy had not been rendered, and no assignment had been made.' Id. sect. 5047; Bump on Bank. 528. The liability of the plaintiff in error, and the right and title of the company, were legal in their character. If the company had sued, it might have sued at law. The rights of the company passed to the assignee, and he also could

enforce them by a legal remedy. The assignee was subrogated to all the rights, legal and equitable, of the bankrupt corporation. This suit was, therefore, well brought in the form adopted. *Hall* v. *U. S. Ins. Co.*, 5 Gill. 484."

The differences between bankruptcy proceedings and a simple foreclosure suit are both numerous and vital. In the former the rights of creditors of all kinds, stockholders, etc., are involved in proceedings where all questions are open either to adjudication or investigation. The assignee had title in that case, and the order directing him to sue was wholly supererogatory. The stockholders, creditors, and all other persons were bound to take notice of bankruptcy proceedings, and what would bind the corporation would of course bind its privies, the stockholders. Moreover, the stockholder in that case "might have applied to the District Court to revoke or modify the order. Had she done so, she would have been entitled to be heard; but it does not appear that any such application was made." (P. 59.)

So far as the claim against Leach & Co. is concerned there was no privity between The Struthers Furnace Company and Leach & Co. *Leach & Co. was not a party to the proceedings, had no notice of them, and would have had no standing in the Court of Common Pleas to move that the order directing suit be modified or revoked.* The receiver in the case at bar had no title even to the assets lawfully seized by him. The rights of general creditors were not before the court. It was not alleged that the corporation was insolvent, neither was the court asked to wind it up. Necessarily the jurisdiction of the Court of Common Pleas, in view of the nature of the foreclosure proceedings, was much more restricted than the jurisdiction of the bankruptcy court in the case above mentioned.

Therefore, we respectfully submit not only that the case cited by this Court is not in point, but that the excerpt from it, appearing in this Court's opinion in the case at bar, does not give an accurate idea of what the case really holds.[17] The omitted matter which is indicated by the *points suspensifs* in the excerpt set forth in the margin is a reference to Revised Statutes, § 4972. This section and §§ 5046-47 are set forth in the Appendix, pp. 33-4, *infra*.

So that the case is distinguishable not only because of the greatly circumscribed jurisdiction of the Court of Common Pleas, but because the stockholder in that case was, if not a party, at least privy to the judgment,[18]

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17. "The order was conclusive as to the right of the assignee to bring the suit. Jurisdiction was given to the District Court by the Bankrupt Act . . . to make it. It was not necessary that the stockholders should be before the court when it was made, any more than that they should have been there when the decree of bankruptcy was pronounced. That decree gave the jurisdiction and authority to make the order. The plaintiff in error could not, in this action, question the validity of the decree; and for the same reasons, she could not draw into question the validity of the order. She could not be heard to question either, except by a separate and direct proceeding had for that purpose."

18. Coe v. Armour Fertilizer Works, 237 U. S. 413, 59 L. ed. 1074, 31 Sup. Ct. Rep. 625.

Glenn v. Leggett, 135 U. S. 533, 34 L. ed. 262, 10 Sup. Ct. Rep. 867.

Hawkins v. Glenn, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739.

Montezuma Canal Co. v. Smithville Canal Co., 218 U. S. 371, 54 L. ed. 1074, 31 Sup. Ct. Rep. 67.

whereas, Leach & Co. was neither party nor privy to the proceedings in the Court of Common Pleas. As stated in 1 Freeman on Judgments (5th ed.), § 318, p. 633:

> "While parties and privies may attack a judgment for lack of jurisdiction, this right, in most states, is restricted to cases where the judgment is void on its face. But strangers are not bound by this limitation and may offer evidence to show the absence of jurisdiction. A decree awarding relief entirely beyond the scope and subject matter of the complaint, being void, may be collaterally impeached by a stranger whose rights are affected."

This is the law in Ohio. (*Coe.* v. *Erb,* 59 Ohio St. 259, 268.)

Of course, the cases cited on p. 6 of this Court's opinion in support of the proposition that where a court *has* jurisdiction to appoint a receiver the validity of the appointment cannot be inquired into in collateral proceedings, do not meet the respondent's contentions. Consequently these cases need not be noticed, except to remark that, obviously, there is nothing sacrosanct about the appointment of a receiver. Like any other order or judgment, an order appointing a receiver may be collaterally attacked when the court *lacks* jurisdiction.

We respectfully submit that the Court of Common Pleas was without power to seize property not covered by the mortgage, and that the order directing the receiver to sue Leach & Co. was wholly void.

Before discussing the jurisdiction of the Court of Common Please in the stockholder's suit, let us first notice another very important matter.

III.

We respectfully submit that this court departed from the issues joined in the Circuit Court of Appeals, and failed to give effect to the stipulation of the parties in that court.

Concerning the appointment of the receiver this Court says that

> "its validity was not challenged in any respect by the answer of Leach & Co. in the District Court, which admitted that Grant had been 'duly appointed' receiver of all the Company's property." (P. 6.)

Now consider the position of Leach & Co. when the Circuit Court of Appeals notified the parties that it would be inclined to remand the cause, and invited counsel to consider whether the rights of their clients might properly be preserved by means of a stipulation for the filing of a transcript of the record in the Court of Common Pleas *and* the argument of the *specific questions* stated by the Court. (R. 266-7.)

Surely, it will not be asserted that in case of remandment Leach & Co. could not have obtained leave to amend its answer. But, clearly, in view of the statement contained in the Court's letter,[19] there was no need of insist-

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19. "The further argument desired will be devoted to the question whether authority to bring this suit either was or could be conferred upon the receiver, and be rightly based upon the pleadings, in connection with the controlling statutes and equitable principles, and whether such authority would or would not be rightly incidental to and consistent with the nature and purposes of his possession of those assets which passed to the receiver." (R. 267.)

ing upon remandment. All parties understood that the *validity* of the proceedings in the Court of Common Pleas, regardless of the record made in the District Court, would be considered by the Circuit Court of Appeals in the event that the parties entered into a stipulation and filed a transcript of those proceedings. We respectfully submit that the Court's letter is not subject to any other construction.

Moreover, both parties entered into the suggested stipulation and filed briefs addressed to whether or not the orders entered by the Court of Common Pleas were valid. Our position has been consistent from the first, as is evidenced from the matter set forth in the margin,[20]

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20 IV.

In simple foreclosure proceedings the power of a court to appoint a receiver is necessarily limited to the appointment of a receiver for the mortgaged property.

The alleged claim of The Struthers Furnace Company against Leach & Company under the contract of April 5, 1922, pursuant to which the bonds secured by the mortgage sought to be foreclosed were sold, necessarily was not a part of the mortgaged property.

The State Court was therefore without jurisdiction to direct the receiver to sue Leach & Company on the alleged claim.

V.

The rights of neither creditors nor stockholders were involved or could be involved in the foreclosure suit, consequently the prosecution of any suit against Leach & Company is wholly foreign to and inconsistent with not only the foreclosure suit, but the Receiver's possession of the mortgaged assets. A receivership in foreclosure proceedings is entirely different from a receivership for winding up a corporation or in other suits which require a liquidation of a corporation's assets.

which, on our honor as members of this bar, we certify is a copy of certain points that appear in Leach & Co.'s brief filed in the Circuit Court of Appeals after the stipulation was entered into.

We respectfully submit, therefore, that this Court should confine itself to the record made in the Circuit Court of Appeals, and that its failure to do so violates the spirit of the rule so well stated by a member of this Court when a member of another court:

> "The receiver agreed with the sheriff that his taking possession should not affect the validity of any lien which might have been created by the sheriff's levy and continued in force until the receiver's taking possession. The arrangement made by the sheriff and the temporary receiver is to be commended. It was a judicious compromise to avoid a conflict between jurisdictions, and certainly this court will not permit the commendable spirit of confidence which the sheriff showed in the justice and equity of this court to be made a ground for depriving him or those whom he represented of the rights in the property which had been acquired and maintained by lawful levy and subsequent official custody." *Vance* v. *Manufacturing Co.*, 82 Fed. 251.)

Moreover, Leach & Co. in the District Court, *had put in issue* the power of the receiver to sue. (Opinion, p. 4.) Surely, this Court will not say that the issue in the Circuit Court of Appeals after the stipulation was limited to whether the Court of Common Pleas had actually entered an order authorizing the suit against Leach & Co. We *stipulated* that the order had been entered. And how can the *validity* of the order be determined if we are to be told that the validity of Grant's appointment as receiver was not challenged in the District Court and that

we there admitted that Grant had been duly appointed receiver of all the Company's property? Obviously, that is not to determine the *validity* of the order directing Grant to sue, but to decide that its validity is *not an issue.* It is to disregard the letter of the Circuit Court of Appeals, or else to convert it into mere jugglery of words, after our reliance on it. It is to pass upon issues here other than those joined in the Circuit Court of Appeals.

IV.

The court of common pleas was without jurisdiction of the subject-matter of the stockholder's suit, which was solely for the appointment of a receiver, and the order appointing a receiver therein was coram non judice and void.

This court's decision herein, we submit with great respect, is based upon a misconception of what constitutes jurisdiction, an inadvertent misstatement of respondent's contention, and cases that have practically been overruled. It is contrary to the Ohio decisions, numerous decisions by this court, and the overwhelming weight of authority.

On pages 5-6 of the opinion herein the Court states that

> "it is asserted that under the petition of the preferred stockholder, in which no other relief was prayed, the appointment was *erroneous,* under the decisions of the Ohio courts. But, however, this may be, the court had jurisdiction and the power to determine these questions." (Italics ours.)

As a reference to p. 17, *et seq.,* of our original brief in opposition to the petition for certiorari herein will

show, the Court has inadvertently misstated the contention of respondent, and in such a way that it constitutes a reflection upon either their good faith or professional ability. No lawyer would contend that a merely *erroneous* judgment is subject to collateral attack. The excerpt from page 20 of our original brief[21] clearly indicates our position.

This Court in *Reynolds* v. *Stockton,* 140 U. S. 254, approved the following definition of *jurisdiction:*

> "Jurisdiction may be defined as the right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials: First, the court must have cognizance of *the class of cases* to which the one to be adjudged belongs; second, the proper parties must be present; and third, the point decided must be, in substance and effect, within the issue." (Italics ours.)[22]

Now, we ask, to *what class* of cases does the stock-

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21. "The Court was wholly without jurisdiction of the subject matter and all that it did in said so-called suit was coram non judice and void.

15 Corpus Juris, p. 853.

Where there is an absence of jurisdiction, not even the consent of all parties in interest can confer it.

1 Tardy's Smith on Receivers (2nd. ed.), p. 63."

22. See also:

Charles v. White, 214 Mo. 187, 112 S. W. 545, 549.

State ex rel. McManus v. Muench, 217 Mo. 124, 117 S. W. 25, 29.

and the other cases cited in our Supplemental brief, p. 23 et seq.

holder's suit belong? The answer is that a suit *solely* for the appointment of a receiver is unknown to the law. The answer is that where a court is without power to grant the ultimate relief sought, it has no power to appoint a receiver, and that, if it does, its order is absolutely *void* and, therefore, subject to collateral attack whenever it is thereafter relied on for any purpose. The cases leave no room for doubt on this point, as we shall soon demonstrate.

In 1 Tardy's Smith on Receivers, § 14, p. 51, it is said:

> "The pending action must be one for such relief as can be litigated between the parties even if the application for the appointment be denied. Hence if the sole object of the suit is the appointment of a receiver, the court will not take jurisdiction in the absence of statutory provisions allowing such suits. The court must have jurisdiction to entertain the cause of action to which the appointment of the receiver would be ancillary and have power to grant the relief demanded in the action, for if the court has no jurisdiction over the subject matter it has no authority to appoint a receiver, since it is fundamental that *there is no such proceeding in equity as a plain receivership action, in which the appointment of a receiver is the only desideratum. The action must, of course, be one which comes within the equitable jurisdiction of the court and the relief prayed for must be of such a character as to be germane to the cause of action set up.*
>
> *In order to constitute a suit as pending within the above rule it is necessary that the complaint or bill shall state a cause of action against the defendant.*" (Italics ours.)

In this Court's opinion herein it is said that section 11894 provides that the Common Pleas Court may appoint a receiver "in causes pending therein in certain designated cases, and '6. In all other cases in which re-

ceivers heretofore have been appointed by the usages of equity.'" (P. 5.)

But the appointment of a receiver is purely *ancillary. The usages of equity have never sanctioned the appointment of a receiver where that is the ultimate and only relief sought.* And the Ohio decisions cited in our original brief in opposition to the petition for certiorari herein demonstrate that this universal rule is followed in Ohio. There is, therefore, no *class of cases* to which this stockholder's suit belongs. The Court of Common Pleas did not have "cognizance of the *class of cases* to which the one to be adjudged belongs."

Moreover, there was no cause pending in the Court of Common Pleas, as provided by section 11894 of the Ohio Code. The plaintiff alleged no breach of duty or other wrongful act; and, so far as the record shows, his petition was never thereafter amended. Indeed, there was nothing to amend by. As said by the Supreme Court of Ohio in *Spoors* v. *Cowen,* 44 Ohio State 497, 9 N. E. 132, 135:

> "But, in order that a party may be permitted to amend, there must be something to amend by (*Shamokin Bank* v. *Street,* 16 Ohio St. 10); so, unless a case is presented that could be amended, there is no case upon which a judgment can be rendered. A judgment rendered, where no case has been stated, is as much a judgment upon a case *coram non judice,* whatever may be the jurisdiction of the court rendering it, as a judgment upon a case, however perfectly stated, before a court not clothed with jurisdiction to hear and determine it."

In

Blanchard Bro. & Lane v. *The S. G. Gay Co.,*
289 Ill. 413,

a stockholder of a corporation filed a bill for the ap-

pointment of a receiver. No fraud or mismanagement was alleged. A receiver was appointed, and in a *collateral attack* the appointment was held absolutely *void.* The Supreme Court said:

> "The court clearly had no jurisdiction by reason of the allegations of the bill, all of which are above set forth to appoint a receiver to take charge of and distribute the assets. * * * The court having no jurisdiction to entertain the bill and to appoint a receiver with the powers aforesaid, the decree was void and the receiver acquired no title to any of the property and therefore could convey no title. (*Fitch* v. *Wetherbee,* 110 Ill. 475.) The decree being absolutely void was open to collateral attack. (*People* v. *Weigley, supra.*) In any judicial sale by the receiver the rule of *caveat emptor* must be applied. *Hutson* v. *Wood,* 263 Ill. 376; *Manternach* v. *Studt,* 240 id. 464."

See also

Taylor v. *Exnicious,* 197 Cal. 443, 241 Pac. 397.

In

People v. *Weigley,* 155 Ill. 491,

a case very similar to the one in the case at bar, cited in the quotation above, the Supreme Court of Illinois held that where a court was without power to grant the ultimate relief prayed for it had no power to appoint a receiver; that the appointment was a nullity, and that one who interfered with the possession of the receiver could not be punished for contempt of court.

Neither the Ohio Code nor the usages of equity authorize the appointment of a receiver in a suit by a stockholder where that is the sole and ultimate relief sought and no breach of duty or other wrongful act is alleged. The appointment of a receiver in these circumstances is as void as the granting of letters testamentary on the estate of a living person, or an order undertaking to con-

trol the official discretion of the chief executive of a State or Nation. In

Jones v. *Schaff Bros. Co.*, 187 Mo. App. 597, 174 S. W. 177,

a receiver had been appointed on the voluntary application of an insolvent corporation. The appointment and all orders entered were held to be void in a *collateral attack* on them. The Court said:

> "The appointment of a receiver is not the ultimate end and object of a suit. The court cannot appoint a receiver upon the ex parte application of the corporation itself. There must be a proceeding pending. * * * So that there is no known statutory authority given a court to appoint a receiver upon the mere ex parte application of an insolvent corporation to take charge of and manage its affairs. And a court of equity has no inherent power to appoint such receiver except as an incident to and in a pending suit. [Citing cases.] * * * Consequently the circuit court was without jurisdiction to appoint a receiver, and its order, as well as everything done in the alleged receivership, was void and can be impeached even in a collateral proceeding. [Citing authorities.]"

See also:

Jones v. *Bank of Leadville*, 10 Colo. 464, 17 Pac. 272.

Whitney v. *Hanover National Bank*, 71 Miss. 1009, 15 So. 23.

Texas, etc. Railroad Co. v. *Gay*, 86 Tex. 604, 26 S. W. 599.

State ex rel. Merriam v. *Ross*, 122 Mo. 435, 25 S. W. 947.

Lewis v. *Shaw*, (Cal.) 246 Pac. 86.

Bibby v. *Dieter*, 15 Cal. App. 45, 113 Pac. 874.

We respectfully submit that the cases cited on page

6 of the opinion herein are clearly not in point. Surely not the case of

Barbour v. *National Exchange Bank,* 45 Ohio State, 133,

where the holding of the Court was as stated in the syllabus set forth in the margin.[23]

The case of

McNary v. *Bush,* 35 Ore. 114,

is merely a decided case that is patently wrong, and has since been practically overruled, or at least reduced to an absurdity. In

Cook v. *Leona Mills Lumber Co.,* 106 Ore. 521,

the Supreme Court reviewed the authorities and reached the following conclusion:

> "Under our Code the appointment of receivers is an ancillary remedy, in aid of the primary object of litigation, and such relief must be germane to the principal suit, and *a proceeding cannot be maintained where the appointment of a receiver is the*

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23. "1. S. was surety of an insolvent manufacturing corporation for the payment of a large amount of overdue indebtedness. The corporation was making no effort to pay its debts. Its business could not be continued without loss and wasting of its assets. The sale of its property and collection of its accounts were necessary to the payment of its debts. S. brought his action under section 5845 of the Revised Statutes, to compel it to pay the indebtedness upon which he was surety, by subjecting its property to such payment. Held: The appointment of a receiver of the property of the corporation was authorized by section 5587 of the Revised Statutes."

> *sole primary object.* Neither at law nor in equity is an action permissible in which only the appointment of a receiver is sought.
>
> From the face of the petition it clearly appears that the receivership was the aim and object of this suit and was not ancillary to any relief sought or prayed for in the complaint. *Hence, the pleading failed to give the court jurisdiction to appoint the receiver.*" (P. 530-1.) (Italics ours.)

This is necessarily so. For if there is no such action known either to law or to equity, it must follow that the court does not have cognizance of that *class of cases.* And if the court does not, then *jurisdiction* of the subject matter does not exist. The fact that in the case above cited there was a direct attack upon the order appointing the receiver is manifestly irrelevant.

The decisions relied on by the court in *McNary* v. *Bush,* 35 Ore. 114, have since been questioned and practically overruled by the court that rendered them. See

> *State* v. *Union Nat. Bank,* 145 Ind. 537, 44 N. E. 585, 588.

We respectfully submit, therefore, that the decision of this Court on the point under consideration is not in accord with legal principles or the decided cases.

V.

The court's decision that the receiver in the case at bar did not sue in a foreign jurisdiction is based upon a misapprehension of the facts, and is, we submit, erroneous.

We respectfully submit that the fact that the receiver was directed to sue in "a Federal Court within Ohio, and having jurisdiction in territory within which the Common Pleas Court itself was located" (Opinion, p. 7) is irrelevant. This Court accepts the principle that a receiver has "no extra-territorial power of official action." (P. 7.) This is because the court appointing him has none. Obviously, therefore, the test is not the territorial jurisdiction of the court in which suit is brought, *but the territorial jurisdiction of the court that appointed the receiver.*[24]

The territorial jurisdiction of the Common Pleas Court is limited to the county in which it sits. (Throckmorton's Ohio Code (1929), § 1532. *Wilmot* v. *Cole,* 10 O. D. 77, 23 B. 339.)

We also respectfully submit that equally irrelevant is the fact that no *administration* of the property within the District Court was sought, as the cases cited in our Original brief, (p. 37), show.

The question presented by us in the case at bar was not raised in *Shields* v. *Coleman,* 157 U. S. 168, nor in *Harkin* v. *Brundage,* 276 U. S. 36. Clearly, there is an essential difference between instituting an independent

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24. Texas, etc. Railroad v. Gay, 86 Tex. 604, 26 S. W. 599, and cases cited in our Original brief, p. 37.

suit, and making a motion in a pending suit concerning property in the court's possession, particularly where there is a conflict of jurisdiction. If another court has exclusive jurisdiction, then it is the duty of the latter court to surrender the property to the agent of the other court. Moreover, in the *Harkin* case, *both* courts sat in Cook County.

It is also a fact that in *Shull* v. *Fidelity & Guaranty Co.*, 81 W. Va. 184, the Federal receiver instituted the suit within the *territorial jurisdiction* of the court that appointed him. (Judicial Code, § 194.)

We respectfully submit that *territorial* jurisdiction is, in any event, irrelevant. It is a mere incident in one type of case. The key to the whole situation is that *a person without title must seek the aid of another court, which has not only the power but the duty of determining who shall sue, and what shall be done with the fund in the event of a recovery.* (See our original brief.)

In conclusion it is with deference submitted that a rehearing should be granted.

Respectfully,

EDWARD R. JOHNSTON,
FLOYD E. THOMPSON,
HENRY JACKSON DARBY,

Attorneys for A. B. Leach & Co., Inc., above named respondent.

We, the undersigned counsel for the respondent, A. B. Leach & Co., Inc., hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

EDWARD R. JOHNSTON,
FLOYD E. THOMPSON,
HENRY JACKSON DARBY.

APPENDIX.

Revised Statutes of the United States (1873-74) Second Edition 1878:

"Sec. 4972. The jurisdiction conferred upon the district courts as courts of bankruptcy shall extend:

First. To all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy.

Second. To the collection of all the assets of the bankrupt.

Third. To the ascertainment and liquidation of the liens and other specific claims thereon.

Fourth. To the adjustment of the various priorities and conflicting interests of all parties.

Fifth. To the marshaling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors.

Sixth. To all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy."

"Sec. 5046. All property conveyed by the bankrupt in fraud of his creditors; all rights in equity, choses in action, patent-rights, and copyrights; all debts due him, or any person for his use, and all liens and securities therefor; and all his rights of action for property or estate, real or personal, and for any cause of action which he had against any person arising from contract or from the unlawful taking or detention, or injury to the property of the bankrupt; and all his rights of redeeming such property or estate; together with the like right, title, power, and authority to sell, manage, dispose of, sue for, and recover or defend the same, as the bank-

rupt might have had if no assignment had been made, shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, but subject to the exceptions stated in the preceding section, be at once vested in such assignee."

"Sec. 5047. The assignee shall have the like remedy to recover all the estate, debts, and effects in his own name, as the debtor might have had if the decree in bankruptcy had not been rendered and no assignment had been made. If at the time of the commencement of the proceedings in bankruptcy, an action is pending in the name of the debtor for the recovery of a debt or other thing which might or ought to pass to the assignee by the assignment, the assignee shall, if he requires it, be admitted to prosecute the action in his own name, in like manner and with like effect as if it had been originally commenced by him. And if any suit at law or in equity, in which the bankrupt is a party in his own name, is pending at the time of the adjudication of bankruptcy, the assignee may defend the same in the same manner and with the like effect as it might have been defended by the bankrupt."

OHIO CODE.

Sec. 11894. "Appointment of Receiver. A receiver may be appointed by the supreme court or a judge thereof, the court of appeals, or a judge thereof, in his district, the common pleas court or a judge thereof in his district, or the probate court, in causes pending in such courts respectively, in the following cases:

1. In *an action by a vendor to vacate a fraudulent purchase of property,* or by a creditor to subject property or a fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of a party whose right to or interest in the property or fund, or the proceeds thereof, is probably, and when it is shown that the property

or fund is in danger of being lost, removed or materially injured;

2. In *an action by a mortgagee, for the foreclosure* of his mortgage and sale of the mortgaged property, when it appears that the mortgaged property is in danger of being lost, removed or materially injured, or that the condition of the mortgage has not been performed, and the property is probably insufficient to discharge the mortgage debt;

3. After *judgment, to carry the judgment into effect;*

4. After *judgment, to dispose of the property according to the judgment,* or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied and the judgment debtor refuses to apply the property in satisfaction of the judgment;

5. In the cases provided in this title, and by special statutes when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights;

6. *In all other cases in which receivers heretofore have been appointed by the usages of equity.''*

Sec. 11897. Powers of Receiver. *Under the control of the court,* the receiver *may* bring and defend actions in his own name, as receiver, take and keep *possession* of the property, receive rents, *collect, compound for, and compromise demands, make* transfer, and generally do such acts respecting the property *as the court authorizes.''*